

**In the Matter of**

Arbitration between	)	
	)	
<b>Law Enforcement Labor Services, Inc.,</b>	)	
<b>Patrol Unit,</b>	)	
<b>Union,</b>	)	ARBITRATION AWARD
	)	
<b>and</b>	)	
	)	<u><b>McNichols Seniority Grievance</b></u>
<b>City of Orono, Minnesota,</b>	)	
<b>Employer.</b>	)	

**BMS Case No. 05-PA-910**

**Appearances**

***For the Union***

**Marylee Abrams, General Counsel  
Law Enforcement Labor Services, Inc.  
327 York Ave.  
St. Paul, MN. 55101**

***For the Employer***

**Cyrus Smythe, Consultant  
Labor Relations Associates, Inc.  
18955 Maple Lane  
Deephaven, MN. 55331**

**Jurisdiction**

On January 28, 2005, David McNichols, (Grievant), a member of the Law Enforcement Labor Services patrol unit (Union) presented to the City of Orono, Minnesota (Employer) a grievance challenging the Employer's placement of the Grievant on the seniority roster. The grievance was brought under the Collective Bargaining Agreement in effect between the Union and Employer effective January 1, 2004 through December 31, 2005. The dispute was not resolved through the parties' grievance process and has proceeded to arbitration before Arbitrator Sara D. Jay, who was jointly selected by the parties.

Hearing was held in Orono, Minnesota, on June 21, 2006, The parties stipulated to the arbitrability of the grievance. At the hearing, both parties were given a fair and equal

opportunity to present their respective cases. The arbitrator accepted exhibits into the record. Witnesses were sworn or affirmed, and testimony was subjected to cross-examination. Closing argument was made in the form of post-hearing briefs which were timely received on July 24, 2006, on which date the record is deemed closed.

### **Issues**

The parties' Agreement states that the arbitrator may only consider those issues which were submitted in writing to the arbitrator. Those issues are:

Does Article IX, Section 9.1 of the Labor Agreement define "Seniority" as: "... the employee's length of continuous employment with the Police Department"?

Are the past practices of the parties under the Labor Agreement in determining the accumulation and the use of seniority under Article IX consistent with the definition of seniority in Section 9.1?

(Submitted by the Employer).

Did the Employer violate the Labor Agreement when it granted Officer Jay Dembouski seniority accrual while he worked as a Sergeant outside the patrol officers' bargaining unit?

(Submitted by the Union).

### **Relevant Contract Provisions**

#### *Article III – Definitions*

....

3.3 EMPLOYEE: A member of the exclusively recognized bargaining unit.

#### *Article IX – Seniority*

- 9.1 Seniority shall be determined by the employee's length of continuous employment with the Police Department .... Seniority rosters may be maintained by the Chief on the basis of time in grade and time within specific classifications.
- 9.2 During the probationary period a newly hired or rehired employee may be discharged at the sole discretion of the EMPLOYER. During the probationary period a promoted or reassigned employee may be replaced in his previous position at the sole discretion of the EMPLOYER.
- ...
- 9.4 Senior employees will be given preference with regard to changes in job classification through transfer, assignment or promotion when the job relevant qualifications of employees are equal.
- 9.5 Senior qualified employees shall be given shift assignment preference after eighteen (18) months of continuous full-time employment.
- 9.6 One continuous vacation period shall be selected on the basis of seniority until March 15 of each calendar year.

### **Factual Background**

The Employer is a Minnesota city with a police department which has two bargaining units. The police officer unit has been an organized unit for many years; the sergeant unit is more recently organized. Both units are represented by the Union involved in this grievance.

The Grievant began his employment as a police officer on March 16, 1992. Another patrol officer, Jay Dembowski, ( J ), had begun April 6, 1990. J was promoted to sergeant in July 2000, prior to the time that the sergeants became an organized unit and prior to any

collective bargaining agreement for the sergeants. J voluntarily returned to the patrol unit in August 2004. On his return to the unit, J was advised by the Union that he had not accrued seniority while working as a sergeant outside the patrol unit. J filed a grievance and the Chief of Police placed him on the seniority roster based on his original hire date, with unbroken seniority within the patrol unit. The Union did not support J's grievance, but filed a grievance on behalf of the Grievant, who would be senior to J if J's time working as a sergeant were not included in his patrol unit seniority placement.

When the sergeant unit was organized, the unit used the patrol contract as a basis for contract negotiations. The language relating to determination of seniority (Article 9.1) is the same in both contracts. One sergeant served briefly as a Lieutenant, and was involuntarily returned to police officer rank and placed on probation. His seniority was treated as unbroken within the police unit. At that time, there was no supervisory unit. The individual has since been re-promoted, to sergeant. There were no other examples of individuals who had left the patrol unit for other positions with the police department and then returned to patrol, except the one at issue here.

Currently, the sergeant seniority list is maintained based on time as a sergeant, regardless of time spent in the police department. The patrol unit seniority list has been based on time served for this Employer, which has been identical to time served in the patrol unit. The Chief posted a document entitled "Seniority List" in January 2005. The list includes the chief and apparently all licensed law enforcement personnel, in order of their dates of hire. After January 2005, the Employer continued to post vacation preferences for sergeants based on unit seniority.

## **Positions of the Parties**

### *Position of the Union*

The Union takes the position that the Grievant should be placed above J on the seniority list. According to the Union, seniority rights exist only pursuant to the contract. Patrol officer seniority rights are earned only by members of the patrol officer bargaining unit, and those rights are earned by the officers only in relation to each other. Citing a treatise and several arbitration awards, the Union contends that where there is no contract provision providing otherwise, seniority is not accumulated by an employee while working outside the bargaining unit, particularly when working as a supervisor or administrator. In some instances, seniority which was previously accumulated has been lost, a result the Union notes is more harsh than the result it seeks here.

The Union further suggests that the Employer should interpret the contract language consistently between units. The sergeant seniority list has been interpreted to list bargaining unit members by their longevity in the sergeant unit. The Union denies that there will be any detriment to the benefits accrued by J, under its interpretation. The Union further denies that the Employer has established a past practice governing seniority accrual, according to the standards set forth in *Ramsey County v. AFSCME*, 309 N.W. 2d 785 (Minn.1981).

### *Position of the Employer*

The Employer takes the position that the Grievant's seniority was established when it failed to contest the accuracy of the data on City Exhibit No. 1, the Department Seniority List dated January 1, 2005. The Employer further takes the position that the plain and clear language of the collective bargaining agreement requires that the time spent by J as a

sergeant not be considered a break in seniority. The Union's interpretation is inconsistent with the past practice of the parties under the patrol agreement, the Employer asserts. According to the Employer, it has shown that a promotion outside of the bargaining unit does not break seniority from the standpoint of accumulation of benefits.

The Employer also asserts that the accumulation of benefits under the sergeants' collective bargaining agreement is consistent with its interpretation of seniority. It notes that no language is contained in the sergeant agreement on shift selection priority based on seniority, and states that the priority list for sergeant vacations is not relevant to the dispute here. The Employer contends that the parties have agreed to practices under the sergeant collective bargaining agreement seniority provision which are different from the mutually accepted practices in the patrol agreement. Interpretation of the sergeants' agreement is irrelevant to the decision in this case which involves only the patrol agreement, in the Employer's view. The Employer concludes that J has greater seniority than the Grievant, and asks that the grievance be denied.

### **Discussion**

As noted, the arbitrator is required to consider and decide only the issues which were submitted in writing. to the arbitrator. The answer to the first question is self-evident, in that Article IX, Section 9.1 of the Labor Agreement contains the words defining "Seniority" as "... the employee's length of continuous employment with the Police Department." However, the meaning of "employee" is also given in the contract, and "employee" is defined as a member of the exclusively recognized bargaining unit," a patrol officer. Reciting the language in the contract does not necessarily assist in applying the language to the facts at

hand.

The second issue submitted for decision is whether “the past practices of the parties under the Labor Agreement in determining the accumulation and the use of seniority under Article IX are consistent with the definition of seniority in Section 9.1.” The phrasing of this issue assumes the existence of a past practice in determining accumulation and use of seniority, a matter which is discussed further below. The underlying issue is further refined by the Union, which is whether the Employer “violated the Labor Agreement when it granted Officer [J] seniority accrual while he worked as a sergeant outside the patrol officers’ bargaining unit.” The last two issues involve interpretation of the intent of the collective bargaining agreement’s seniority accrual provision, as applied to an individual who accepts a promotion outside the covered bargaining unit. J’s retention of previous patrol seniority is not in question, nor is his benefit accrual rate. It is only his seniority in relation to other patrol bargaining unit members which is in question.

Seniority is a right derived from the collective bargaining agreement, and accrues to the covered bargaining unit. Elkouri & Elkouri, *How Arbitration Works*, 6<sup>th</sup> Edition (BNA) at 837. Seniority governs the relationship between bargaining unit members. *Id.* Arbitrators have differed on whether seniority is generally considered to continue to accrue when a bargaining unit member is promoted outside the unit. *How Arbitration Works*, supra, at 861. The better view is considered to be that seniority is not normally intended to benefit anyone outside the bargaining unit. T. St. Antoine, ed., *Common Law of the Workplace*, 2<sup>nd</sup> Edition (BNA), §5.6 (contrib., Calvin Sharpe). However, as with all contract rights, the language of the contract may overrule more general understanding of contract language.

A contract may be explicit in providing that seniority continues to accumulate when a bargaining unit member is promoted outside the unit. *See, e.g., Law Enforcement Labor*

*Services and County of Sherburne*, BMS 98-PA-581 (Thomas P. Gallagher, 4/2/98). A contract may also explicitly or implicitly provide that promotion outside the unit constitutes a break in seniority. See, *Clarkston Community Schools*, 79 LA 48, 52 (Richard Kanner, 1982)(examples cited). It may be regarded as unfair to an employee to require the sacrifice of all seniority rights should the employee return to a bargaining unit after a period of absence, suggesting that an employee should be considered to retain seniority already accrued. *Signal Oil & Gas Co.*, 43 LA 99, 102 (Howard Block, 1964). It may also be regarded as a reasonable interpretation of seniority provisions that an employee who leaves the unit in the hope of acquiring greater rewards does not continue to accrue seniority while absent from the bargaining unit, unless agreed by the parties. Here, the contract makes no specific provision either permitting or prohibiting continued accumulation of seniority for a bargaining unit member who is promoted or who makes a lateral transfer.

Where a transfer is made outside the unit, the usual understanding is that the employee retains seniority which has already been earned, but does not continue to accumulate seniority unless the contract explicitly so provides. *Common Law of the Workplace*, §5.6, *supra*. That principle, as applied here, would support the Union's position. The definition of "employee" as a member of the exclusive bargaining unit also supports the Union's position, implying that rights under the collective bargaining agreement do not accrue to anyone outside the unit. On the other hand, the patrol contract does not make provisions for breaks in seniority due to a transfer out of the unit, or under any other circumstance.

There is no explicit provision in the patrol collective bargaining agreement with regard to seniority upon promotion. The seniority provision itself is identical to the provision in *LELS & County of Sherburne*, *supra*. However, the contract in that case specifically provided that "Employees promoted to supervisory positions within the department shall



retain and continue to earn seniority in the classification from which promoted.” The Grievant in that case had transferred to a non-supervisory position within the police department. Based on the principle of *expressio unis*, Arbitrator Gallagher found that the parties’ maintenance of seniority accumulation for supervisors was intended to exclude maintenance of seniority accumulation for other promotions or movement within the department, and that the Grievant in that case did not continue to accumulate seniority during his service in a non-supervisory position. In contrast, the contract involved here makes no provision at all with regard to movement outside the bargaining unit.

Provisions preserving seniority upon promotion are generally proposed by employers, to encourage experienced bargaining unit employees to accept promotions without sacrificing their seniority rights if the employee does not like the position or is ultimately unable to fulfill its requirements. In this unit, an employee has been involuntarily returned to the patrol bargaining unit without penalty in terms of seniority, although he was placed back on probation.<sup>1</sup> That is the only instance besides the current circumstance in which an officer has returned to the patrol unit after serving in a supervisory position. It is not comparable because the return to the patrol unit was not voluntary on the part of the officer. An involuntary return to a lower-ranked unit, whether due to reorganization or to performance issues, may reasonably be treated differently from a voluntary return. In such instances, parties are entitled to agree to ease the transition to the unit without creating a binding

---

<sup>1</sup> The record was not clear as to the reason for the probationary placement, which may have been routine; departmental reorganization may also have been involved. That the return was involuntary was clear.

practice.

Perhaps more important, one instance does not create a binding past practice. See, *Ramsey County v. AFSCME Council 91, Local 8*, 309 N.W.2d 785, 788 (Minn. S. Ct. 1981); *Clarkston Community Schools, supra* (past practice is repeated over time, so as to reasonably imply that parties have agreed to the practice; one instance does not create a past practice).

Although there is no binding past practice here, the parties' usage of the same language can be instructive in resolving their intended interpretation. The parties have adopted identical language on seniority in the sergeant collective bargaining agreement. There is also identical language for the sergeants' election of vacation periods based on seniority. The sergeants' seniority list posted for purposes of vacation selection states that "[p]ursuant to the current LELS contract: One continuous vacation period shall be selected on the basis of seniority." The seniority list gives the names of the sergeants in order based on their seniority in the sergeant unit, not based on their time in the department.

This interpretation is inconsistent with the interpretation which the Employer seeks to use in the patrol unit. A list of departmental hire dates, even if labeled a "seniority list," does not govern over a seniority list which the parties have used to enforce seniority rights such as vacation selection according to seniority. The Chief of Police is not considered to have seniority in either the sergeant or the patrol units, yet she is included on that list. Inconsistent interpretation of the same language by the same Employer as applied to two different units must be considered in context of the language. Application in the sergeants' unit is relevant, as the language was taken directly from the patrol contract into the sergeant contract, according to uncontradicted testimony.

If the Arbitrator is to adopt an interpretation of the Collective Bargaining Agreement in a manner which confers one of the basic benefits of the Agreement upon those

outside the Bargaining Unit, in derogation of the rights of the employees for whom the Agreement was expressly negotiated, it would require more than mere inference to support such a conclusion.

*Signal Oil & Gas Co., supra*, 43 LA at 101. The ordinary interpretation of accumulation of seniority rights for non-bargaining unit member is that no rights continue to accrue, although previously-acquired seniority is retained. *Id.* Here, the practice of the parties under the sergeants' agreement is consistent with that view, and supports the Union's interpretation of the seniority provisions.

On the language of the collective bargaining agreement here, the parties apparently did not take into account the possibility that the sergeants would become a separate bargaining unit. However, once the sergeants had done so, the parties did not create a situation which would permit identical language governing seniority to be interpreted or used differently in the sergeant collective bargaining agreement and the patrol collective bargaining agreement. As previously noted, there is no binding past practice to be applied to the situation here. Under the circumstances of this case, in this city, it is only reasonable to interpret the collective bargaining agreement provisions to require that accumulation of patrol seniority under the patrol collective bargaining agreement be limited to those in the patrol bargaining unit.

### **Award**

The dispute in this case centers on the seniority of a member of the patrol officer bargaining unit who was promoted outside the bargaining unit and then voluntarily returned. His seniority as a sergeant was based on his time in that unit; the parties have shown no consistent practice to the contrary in the patrol unit. While the Agreement states that

seniority shall be based on “length of continuous employment in the police department,” the benefits of the Agreement accrue only to employees as defined therein to be members of the patrol bargaining unit. Thus, limiting accrual of patrol unit seniority to those serving in the unit is consistent with the language of the Agreement. There is no language in the collective bargaining agreement which provides for continued accrual of patrol seniority for sergeants. No binding past practice was shown in the patrol unit; the practice in the sergeant unit affecting all of its members has been to base vacation shift priority on length of time as a sergeant, under identical contract language. Thus, based on the evidence and practice of the parties, it is concluded that the Employer violated the Agreement by granting patrol seniority accrual to an officer for his time as a sergeant outside the patrol officers’ bargaining unit.

The grievance is sustained.

Date: August 23, 2006

Sara D. Jay, Arbitrator